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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS D. MCBRIDE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, William V. Bradley, by his attorney, Thomas D. McBride, respectfully presents to this Court his petition and prays that a writ of certiorari issue under the authority of Judicial Code sec. 240a, 43 Stat. 938, 28 U. S. C. A. 347a, to review the Judgment of Sentence of the United States Circuit Court of Appeals for the Third Circuit, in a summary criminal contempt proceeding entered therein on September 28, 1942, in Cause No. 8140, October Term, 1941, and the Order of said Court purporting to amend said Judgment of Sentence entered on the records of said Court on October 1st, 1942. This petition is filed herein on the 22nd day of October, 1942. There was no Opinion filed by the said Court.

Statement of the Case.

1. Your petitioner, William V. Bradley, is now incarcerated in the Berks County Jail in the City of Reading, State of Pennsylvania, on a commitment of the Clerk of the United States Circuit Court of Appeals for the Third Circuit, dated October 1st, 1942, under cover of a Judgment of Sentence for contempt of that Court under sec. 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. sec. 385. The facts leading up to said commitment are as hereinafter stated.

2. On September 14, 1942, there was pending and undetermined in the said Circuit Court of Appeals a petition filed by the National Labor Relations Board as petitioner against the Delaware-New Jersey Ferry Company, Respondent, as of October Term, 1941, Number 7850, to show cause why the said Respondent should not be adjudged in civil contempt of a decree of the said Court. The subject matter of said decree, so far as it is relevant hereto, will be stated in a later paragraph hereof.

3. A hearing on said petition was scheduled to commence before the Hon. Albert Branson Maris and Herbert F. Goodrich, Circuit Judges, at 10:30 a. m. on said September 14, 1942, in the court-room of the said Court situate in the City of Philadelphia on the western side of the second floor of the United States Court House near the Chestnut Street entrance. A public corridor is on the second floor extending from Market Street to Chestnut Street, a distance of approximately 150 yards. The said building houses many other offices and departments of the United States in addition to the courts and court-rooms, although the second floor on said side of the building is exclusively occupied by a number of court-rooms of the District Court and the office of its Clerk, also the court-room of the Circuit Court of Appeals and the office of its Clerk, and in addition thereto a room used by newspaper reporters.

4. On behalf of the Respondent, Delaware-New Jersey Ferry Company, one Louis Kapelski, General Manager of the Delaware River Ferry Company (which company was not a party to the proceeding) on the said 14th day of September, 1942, close to 10 a. m. (R. 12), came to the court house together with one Ludolf Josendale, an official of the Respondent Company. Kapelski was not under subpoena (R. 14) but was voluntarily appearing at the request of Josendale (R. 6, 14).

5. Your petitioner, William V. Bradley, had been requested to appear as a witness on behalf of the National Labor Relations Board. Your petitioner is the President of the United Marine Federation Local No. 333, a Labor Union, whose members or former members had been involved in the proceeding as to which the said Court had issued its decree and in connection with which the National Labor Relations Board had petitioned for a contempt citation, contending that the Company had not restored to duty certain employees in accordance with the said decree of the court. Among those former employees was one Herbert Garrison.

6. Kapelski did not testify on September 14th. He apparently was not called (R. 6) but he was called and did testify on September 15th, 1942, when, by reason of certain testimony given by him, the said Circuit Court of Appeals directed *sua sponte* the entry of a rule to show cause why your petitioner, William V. Bradley, should not be punished for a criminal contempt of said Court, returnable September 21st, 1942, at 10:30 a. m. The United States Attorney for the Eastern District of Pennsylvania was invited to and did enter an appearance as *amicus curiae*. The trial, which was directed to be held upon the return of the Rule, was continued on the motion of the United States Attorney from September 21, 1942 to September 28, 1942.

7. The testimony which was taken stenographically at the trial of your petitioner on September 28, 1942, and duly certified by the Clerk of said Court, shows the following:

Having arrived early at the court house on September 14th, 1942, your petitioner, Bradley, at 10:15 a. m. was leaving the said court house to get a shave before the hearing commenced, when he was hailed by Kapelski, whom he knew (R. 8). Bradley shook hands with Kapelski and Josendale in the public corridor near the Market Street entrance and about 100 yards away from the aforesaid court-room (R. 10, 12). Kapelski then asked Bradley what he was doing, and the latter responded that he was there to testify for the National Labor Relations Board. Kapelski then said that he was there for the purpose of testifying against Herbert Garrison (R. 8). Whereupon Bradley retorted "Well, if you are on their side you are going to get a good fucking" (R. 9). The entire conversation, lasting only a few seconds (R. 15) took place in the presence of and in the hearing of Josendale who was known by Bradley to be on the other side of the case (R. 13). Bradley then continued on to get his shave. Kapelski and Josendale proceeded along the corridor toward the court-room. Kapelski waited around outside the court-room (R. 10) and at approximately 11:30 a. m., not having been called to testify, he left the corridor (R. 14). He testified that his prior agreement with Josendale was that he would be permitted to get back to his office by 11 o'clock (R. 14). Kapelski testified that he did not leave as the result of Bradley's statement (R. 16); that he did not consider that statement to be a threat directed against him (R. 15) but that he understood merely that Bradley meant that he, Kapelski, was on the side which was going to lose the case (R. 15). The outcome of the case could not affect Kapelski (R. 19, 20). Neither Bradley nor Kapelski were parties to the proceedings, but the company for which Kapelski worked,

viz., the Delaware River Ferry Company, has contractual relations with the Union of which Bradley was President, and such contract was not due to expire until April 30, 1943 (R. 7). Kapelski did not construe Bradley's words as being a threat relating to that contract (R. 19, 20).

The prosecution put in evidence the transcript of the testimony of Kapelski given in the civil contempt proceeding to show a variance between his testimony on September 15th and September 16th. It was this testimony which caused the Court to issue the Rule upon your petitioner. The transcript shows that Kapelski testified on the question of the workmanship of Herbert Garrison and that Kapelski's company, which had formerly employed Garrison, had discharged him (R. 54). He stated that Garrison was discharged by his company because he was an extra man and that as of October 29, 1940, the date of the discharge, all crews were reduced and that the company would maintain only the best men (R. 55). He admitted that prior to testifying he had spoken with Garrison (R. 53). On September 16, 1942, Kapelski was recalled and again examined as to the reason for discharging Garrison. He then stated that Garrison was not a satisfactory worker, and that he would not personally employ him permanently (R. 60). When pressed for a reason he stated that it was because of Garrison's appearance (R. 61). Garrison was a deck-hand on a vessel (R. 61). He admitted that he had previously stated to other persons that Garrison's work was unsatisfactory and that he would not employ him again, repeating his statement, however, that Garrison was an extra man at all times, being hired for brief one or two day fill-in periods (R. 61). He admitted further that he had previously told Josendale that he considered Garrison "unfit for any position in the company" (R. 64). This variance in Kapelski's testimony was considered by the said Court to have been caused by Bradley's statement (R. 2)

although Kapelski himself, from the beginning, insisted that it had not been so caused (R. 52, 53).

In defense, Bradley testified as to the conversation of September 14, 1942, between himself and Kapelski substantially as it had been narrated by Kapelski (R. 31). In addition thereto he denied that he intended in any way to threaten Kapelski and that the expression used by him was simply one habitually used on the waterfront (R. 31); that he had nothing to gain by threatening Kapelski (R. 32); that when he used the word "you" he meant the Respondent Company and not Kapelski personally (R. 32), and that the expression merely meant that "the other side" would get a good licking in the law suit (R. 32); that he meant no disrespect whatever to the Court (R. 33) and that he had only been in any court once before in his life (R. 33); that he had never been arrested for any crime (R. 33); that he did not attempt to dissuade Kapelski from testifying (R. 34); that he had not stopped Kapelski to speak with him, and that the conversation would not have taken place had Kapelski not stopped him (R. 34); that the Union, of which he was an official, had a contract with the company of which Kapelski was an official but that there were no negotiations in progress at that time (R. 35); that Garrison was not presently a member of the Union but had been at the time of the strike, out of which the litigation arose (R. 35). He denied that the words used by him could be construed to be a threat (R. 37). He said that the word he used had never been used to mean that someone would get a physical licking, and that its only meaning was as he used it (R. 38). Evidence was also produced on his behalf that his reputation as a decent, law-abiding citizen was good (R. 38, 39).

8. The Court, at the conclusion of the testimony, i.e. on September 28, 1942, entered an "Order and Judgment" adjudging Bradley in contempt and sentenced him to be

imprisoned for the period of six months, and to pay a fine of $500.00 and stand committed until the sentence is complied with (R. 40).

9. An oral application that the Court fix bail to act as a supersedeas pending proper proceedings for review of the said sentence and commitment was forthwith made, argued and denied (R. 40-48).

10. On September 28, 1942, at approximately 1 o'clock p. m., the United States Marshal for the Eastern District of Pennsylvania took Bradley into custody and conveyed him to the Philadelphia County Prison at Tenth Street and Moyamensing Avenue, where he remained until October 7, 1942, when he was removed to the County Prison of Berks County, in the City of Reading, Pennsylvania, and he has remained in said Prison up to the time of the filing of this Petition.

11. On October 1, 1942, at approximately 10:30 o'clock a. m., Timothy J. McElroy, Esquire, one of counsel for your petitioner, on Bradley's behalf, paid in satisfaction of that part of the Judgment imposing a fine as aforesaid the sum of $500.00 in United States currency to the Clerk of the said Circuit Court of Appeals, who thereupon issued his written receipt and entered the satisfaction on the Docket (R. 2).

12. As the proceedings thus stood your petitioner had paid the fine theretofore imposed upon him by the said Sentence of the Court and had entered upon the service of the said Sentence of imprisonment.

13. Some hours after the said fine was paid and entered on the Docket, more particularly on the afternoon of October 1, 1942, the said Court, in the absence of your petitioner, and without notice to your petitioner or his counsel, and without giving an opportunity to either of them to

say why further judgment should not be pronounced, filed an Order amending the aforesaid Sentence by directing the elimination of the fine of $500.00, but re-imposing the Sentence of six months' imprisonment (R. 70).

Questions Presented.

14. Your petitioner avers that the Order and Judgment of Sentence entered by the said court on September 28th, 1942, as aforesaid, is erroneous, for the following reasons:

(a) Your petitioner did not behave himself in such manner as to constitute a contempt of the authority of the said Court. (See Brief, *infra*, p. 12.)

(b) Your petitioner committed no act of misbehavior in the presence of the Court. (See Brief, *infra*, pp. 12-13.)

(c) Your petitioner committed no act of misbehavior constituting a contempt of the authority of the Court so near to the presence of the Court as to obstruct the administration of justice. (See Brief, *infra*, pp. 13-16.)

(d) Your petitioner committed no act of misbehavior disrupting to quiet and order or actually interrupting the Court in the conduct of its business. (See Brief, *infra*, pp. 13-16.)

(e) At the time of the alleged misbehavior the said court was not in session. See Brief, *infra*, pp. 13-16.)

(f) On September 14th, 1942, at 10:15 a. m., your petitioner was not under or subject to the authority of the said Court in that he is not and was not an officer of said Court.

(g) On September 14th, 1942, at 10:15 a. m., your petitioner was not under or subject to the authority of the said Court in that he was not then a witness under any

lawful writ, process, order, rule, decree or command of the said Court.

(h) On September 14th, 1942, at 10:15 a. m., the said Louis Kapelski was not under or subject to the authority of the Court. He was not an officer of said Court, nor was he a witness under any lawful writ, process, order, rule, decree or command of the said Court. (See Brief, *infra*, pp. 19-20.)

(i) The evidence was insufficient to justify a finding beyond a reasonable doubt that your petitioner was guilty of a criminal contempt of said Court. (See Brief, *infra*, pp. 16-18.)

(j) The sentence imposed, to wit, fine and imprisonment, was in excess of the punishment which the Court has jurisdiction to impose. (See Brief, infra, pp. 21-22.)

15. Your petitioner avers that the Order of October 1st, 1942, purportedly amending the Judgment of Sentence imposed on September 28th, 1942, and the commitment of your petitioner in consequence thereof, as aforesaid, are void in that the said Order being in effect a re-sentence was beyond the jurisdiction of said Court and in excess of the jurisdiction of the said Court, for the following reasons:

Petitioner avers, without re-stating, reasons (a) to (j), inclusive, as stated in Paragraph 14 above, and in addition thereto:

(k) Said Amended Sentence was not entered or pronounced in open court but merely filed with the Clerk in the absence of your petitioner and his counsel and without notice to your petitioner or his counsel and without any opportunity whatever having been given to your petitioner or his counsel to be heard thereon. (See Brief, *infra*, pp. 22-26.)

(l) The Court was without authority to enter any Order or re-sentence whatever since its power had been exhausted upon the payment by your petitioner of the fine imposed upon him by the sentence of September 28th, 1942. (See Brief, *infra*, pp. 26-30.)

(m) The said Order illegally increases the term of imprisonment imposed on September 28th, 1942, by three days despite the fact that petitioner had already entered upon service of the sentence imposed on September 28th, 1942. (See Brief, *infra*, pp. 30-32.)

Reasons Relied Upon for Allowance of Writ.

16. (a) The Judgment of September 28th, 1942, adjudging your petitioner guilty of a contempt of court constituted an erroneous decision of an important question of Federal law which has not been but should be settled by this Court.

(b) The sentence of September 28th, 1942, imposing fine and imprisonment when the Court has jurisdiction to impose only fine *or* imprisonment, constitute an erroneous decision of a Federal question in conflict with the applicable decisions of this Court.

(c) The Order amending Judgment dated October 1st, 1942, upon which petitioner is being held in jail, was so violative of the principles of natural justice and in merely filing it the Court so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE your petitioner respectfully prays that a writ of certiorari under Judicial Code sec. 240a, 28 U. S. C. A. 347a be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court for its review and determination on a day certain to be

therein named a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket In re: William V. Bradley, October Term, 1941, No. 8140; that the said Sentence of September 28th, 1942, and the Order of October 1st, 1942, purporting to amend the said Sentence of September 28th, 1942, of the United States Circuit Court of Appeals for the Third Circuit may be reversed and set aside by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

WILLIAM V. BRADLEY,
By THOMAS D. MCBRIDE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Jurisdiction.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals by certiorari under the authority of Judicial Code, Sec. 240a, 28 U. S. C. A. 347a. Criminal contempt proceedings were reviewed by certiorari in Ex parte Chetwood, 165 U. S. 43, 17 S. Ct. 385, 392; *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693; *Nye* v. *United States*, 313 U. S. 33, 61 S. Ct. 810. The original Judgment of Sentence was entered on September 28th, 1942. The "Order Amending Judgment" was filed October 1st, 1942.

II.

Petitioner Committed No Act of Misbehavior Constituting a Contempt of the Authority of the Court Either in Its Presence or so Near Thereto as to Obstruct the Administration of Justice.

Section 268 of the Judicial Code, 36 Stat. 1163, 28 U. S. C. sec. 385, 28 U. S. C. A. sec. 385, provides as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; Provided, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The conversation between Bradley and Kapelski took place at 10:15 a. m. (R. 40) while the court was not in session and was not due to sit until 10:30 (R. 40); it took place one hundred yards away from the court-room in a public corridor of the court house building (R. 12). It did not take place in a hallway of the court itself which was actually set apart for and used by the court as in *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, nor in a grand jury room as in *Camarota* v. *United States*, 111 F. (2) 243 (3 Cir.); nor was it an act of violence in the court-room as *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, or in an entryway separated from the court-room by a cloth as in *United States* v. *Emerson*, 25 Fed. Cases 15050, 4 Cranch C. C. 188; nor threats repeated in the presence of the court, as in *United States* v. *Carter*, 25 Fed. Cases 14740, 3 Cranch C. C. 23. It is clear, we submit, that the act, whatever its nature, did not occur "in the presence of the court."

The question arises—assuming, but not conceding, that it was a contempt of the authority of the court,—Did it take place "so near thereto as to obstruct the administration of justice."

In *Nye* v. *United States*, 313 U. S. 48, 61 S. Ct. 815, this Court said that these words must be given a geographical and not a causal connotation. Hence, it is an obstruction produced by the geographical contiguity of an act that is the essential element and not the result which follows as a matter of proximate causation. As pointed out in the Dissenting Opinion, the Nye case holds, in principle, that the "surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court-room or while the witness, juror or party was on his way to attend court it would not be [summarily] punishable, because geographical nearness

is not an element in making the contemptuous action an obstruction of justice" 313 U. S. at 54, 61 S. Ct. at 818.

In the Nye case, as stated in the Opinion of the Court (313 U. S. at 50, 61 S. Ct. at 816), the Court was not stating the permissible constitutional limits of the contempt power but was concerned only in interpreting the Act of Congress. The distinction was made by the Act, this Court did not create it. Indeed, the opinion of the Court stated no new principle but merely brought its own decisions, as well as the decisions of other federal courts, back to the clear and convincing statement of this Court in Ex parte Robinson, 19 Wall. 505, 86 U. S. 205. Nothing stated in Ex parte Savin, supra, is in conflict with this view, for in that case this Court did not attempt to determine whether the contemptuous conduct of Savin "was so near to its presence" as to obstruct justice, but decided merely that the contemptuous conduct occurred "in its presence." The improper influence which Savin attempted to exert on the subpoenaed witness Flores first occurred in the jury-room which the court itself had set apart for witnesses, and, secondly,—not in a public corridor as here—but in a hallway of the court-room which had also been set apart for the use of the court. The Court said:

> "The jury-room and hallway where the misbehavior occurred, were parts of the place in which the court was required by law to hold its sessions * * *. We are of opinion that within the meaning of the statute, the court, at least when in session is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." 9 S. Ct. at 702.

It must not be forgotten that the condemned conduct must "obstruct the administration of justice." An act which proximately results in obstruction is not enough, the

act itself must obstruct: *Nye* v. *United States, supra.* The case of *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 38 S. Ct. 560, 62 L. Ed. 1186, which gave a causal connotation to the statute, is no longer law.

The true rule seems to be that where misbehavior occurs in the presence of the court it is summarily punishable whether it immediately obstructs the administration of justice or not; but if it takes place "near" the court the misbehavior itself must be an actual obstruction.

In Ex parte *Robinson,* supra, this Court summed up the Statute as follows:

> "As thus seen, the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

Thus it is seen that though the misbehavior may occur in the vicinity of the court the effect of the misbehavior itself as distinguished from conduct resulting therefrom must be felt in the court-room. In the *Nye* case, supra, the Court said of the contemptuous act under discussion:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

In *Wimberley* v. *United States,* 119 F. (2) 713, (5 Cir.), the Court, speaking of the *Nye* case, says, p. 714:

> "The gist of the decision is that if the misconduct does not disrupt quiet and order or actually interrupt

> the court in the conduct of its business the offender may not be summarily punished for contempt."

See also: *Millinocket Theatre Inc.* v. *Kurson, et al.*, 39 F. Supp. 979, D. C. Maine. Mr. Justice Holmes, dissenting in the *Toledo Newspaper* case, supra, although he did not insist upon a spatial construction of the words "so near thereto", did say:

> "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case to insure order and decorum in their presence as it is stated in Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205. See Prynne, Plea for the Lords, 309, cited in McIlwain, The High Court of Parliament and its Supremacy, 191. And when the words of the statute are read it seems to me that the limit is too plain to be construed away." 247 U. S. 402, 38 S. Ct. 560 at 565.

How can a conversation between two men, taking place in a public corridor one hundred yards away from the courtroom, while the court was not in session and the judges not upon the bench, disrupt quiet and order or actually interrupt the court in the conduct of its business? It could do it only by causing some later act which does take place in the presence of the court and actually obstructs justice. Such proximate causation is not enough.

III.

The Findings and the Evidence Do Not Bring the Case Within the Statute.

Petitioner was presumed to be innocent and it was therefore essential that the court find defendant guilty of criminal contempt only if it found all essential elements

to have been proved beyond a reasonable doubt. This principle is applicable to criminal contempts: *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 39 A. L. R. 451; *Gompers* v. *Bucks Stove & R. Co.*, 221 U. S. 418, 31 S. Ct. 492. This is so despite the fact that defendant is not entitled to a jury trial within the provisions of the Sixth Amendment: *Myers* v. *United States*, 264 U. S. 95, 44 S. Ct. 272.

The specific findings of the court show that this was not done. It may be that a judgment itself imports the proper findings, yet where the findings, as stated, show affirmatively that the essential findings were not made the court is without jurisdiction to impose judgment of sentence.

The Order and Judgment of September 28th, 1942, shows that the Court "now finds that. * * * " (R. 69):

(a) The court was not in session (R. 70);

(b) The misbehavior took place outside of the courtroom (R. 70);

(c) Kapelski was not under subpoena (R. 70);

(d) Bradley intended to and did intimidate Kapelski (R. 70);

(e) As a result Kapelski gave perjured testimony (R. 70).

Thus it is seen that there was no finding that the act of intimidation obstructed justice or disrupted quiet and order or actually interrupted the court in the conduct of its business: *Nye* v. *United States*, 313 U. S. at 52, 61 S. Ct. at 817.

There was no finding of an actual obstruction of justice even resulting from Bradley's conduct since perjury is not *in se* such obstruction: Ex parte Hudgings, 249 U. S. 378, 39 S. Ct. 337, 63 L. Ed. 656.

The whole finding and judgment proceeds upon the rejected doctrine of proximate causation stated in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 38 S. Ct. 560, even though in fairness to the court it should be stated that the court, during the argument, made the unreported comment that that case was no longer the law.

Apart from the findings, however, we contend that the evidence is legally insufficient as a matter of law to support the jurisdiction of the court to impose sentence. This court may look at the evidence to resolve this question: In re Watts, 190 U. S. 1, 23 S. Ct. 718, 47 L. Ed. 933; Ex parte Craig (Hough, J.) 282 F. 138, 154 (2 Cir.).

From the evidence of the prosecution itself it appears:

(a) The conversation between Bradley and Kapelski took place fifteen minutes before the court came upon the bench, not in the court-room or in a place set apart for the use of the court but in a public corridor along which there were court-rooms of another court (R. 8, 10, 12).

(b) Kapelski was coming to the court-room voluntarily and not under subpoena and Bradley knew this (R. 8).

(c) Bradley made no direct and unequivocal threat. The significant word used by him was not understood to be a threat by Kapelski either against himself (R. 15) or against his company (R. 19, 20). The language used is not susceptible of any such interpretation, certainly not beyond a reasonable doubt.

(d) Even if the language be deemed to be ambiguous then the intent with which it was used governs.

(e) Bradley used this language to Kapelski in the very presence of the man on whose side Kapelski intended to testify (R. 13).

Can the Court find as a fact, beyond a reasonable doubt, against all the evidence, both for the prosecution and de-

fense, and the surrounding circumstances, that vulgar language, having no well-defined meaning, which is at its very worst ambiguous, constitutes a threat? We submit not.

The further proposition remains—to our mind serious—that even granting Bradley's conduct constituted misbehavior it constituted no contempt of the *authority* of the court. Section 268 of the Judicial Code, *supra*, says:

> "The said courts shall have power * * * to punish * * * contempts of their authority * * *"

It is seen, therefore, that this statute, being one of limitation: *Ex parte Robinson*, 19 Wall. 505, 86 U. S. 205; *Nye* v. *United States*, 313 U. S. 33, 61 S. Ct. 810, restricts the court to punish only misbehavoir which constitutes a contempt of its *authority*. Mere misbehavior or even criminal conduct does not warrant the exercise of the summary power of the court. The Court had not issued any process whatever to either Bradley or Kapelski; consequently, prior to the actual appearance of either of them in court, it had no authority over them. Neither of them was an officer of the court, nor a party to the proceedings; either of them could have remained away from court for the worst possible motives and still have been beyond the reach of summary punishment. Had Bradley actually bribed Kapelski, in a public corridor, prior to the start of the case and while the court was not in session, it is difficult for us to see how the authority of the court would have been held thereby in contempt. In saying this we do not, of course, contend that such conduct would be beyond the reach of a criminal indictment under sec. 135 of the Criminal Code, 35 Stat. 1113, 18 U. S. C. A. 241; we merely say that in limiting the summary power of a court to the punishment of contempts of its authority the statute means precisely what it says.

In *Baldwin* v. *Franks*, 120 U. S. 678, 692, 7 S. Ct. 656, 30 L. Ed. 766, this Court construed a statute which con-

demned conduct in defiance of the "authority" of the United States. There it was held that to come within the scope of the statute the conduct must be more than a violation of law; it must be an act against the affirmative exercise of the authority of the Government. It must be an act against the Government as a Government. In a court, litigants have the undoubted right to justice and any intentional act interfering with that right is and ought to be punished. But to call the summary contempt power into operation the act must not be a mere wrong to a litigant; it must be a defiance of the court *qua* court.

In *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699, relied upon by the prosecution, this Court, in sustaining summary punishment for an attempted bribery of a witness, repeatedly emphasized that the witness was in attendance upon the court under subpoena. The "authority" of the court had been called into operation with respect to that witness, and any attempt to corrupt him was an attack upon the authority of the court and a punishable contempt, if within the limitations prescribed by the statute. In *Cuddy, Petitioner*, 131 U. S. 280, 9 S. Ct. 703, Cuddy attempted to influence a juror who although not impanelled in the particular case was nevertheless under the authority of the court. In the present case the court found that Bradley sought to induce Kapelski—not to violate a subpoena or an order of court but—to commit perjury. But perjury in itself is not a contempt of court: *Ex parte Hudgings, supra*.

The court does not, under this statute, have a general power by summary action to prevent violations of law or obstructions to justice but only such obstructions as constitute a contempt of the court's authority. All other obstructions are left to the ordinary procedure applicable to criminal cases.

IV.

The Sentence of September 28th Imposing Fine and Imprisonment Was Erroneous.

By Judicial Code, sec. 268, *supra*, it is provided that:

> "The said courts shall have power to • • • punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

Under the law, therefore, the alternative was given to the court either to impose a fine or to imprison; it could not do both.

The Circuit Court of Appeals on September 28th, sentenced petitioner to "be imprisoned for the period of six months and pay a fine of $500.00 and stand committed until the sentence is complied with" (R. 40). The fine, therefore, was not merely collectible from the property of petitioner but the Marshal was directed to and did take him into custody until satisfaction of both aspects of the sentence.

Speaking of the earlier contempt statute, as provided in the Judiciary Act of 1789, this Court, in *Ex parte Robinson*, 19 Wall. 505, 512, 86 U. S. 205, 208, where the District Court exceeded its right to impose only fine or imprisonment by entering an order of disbarment of an attorney, said:

> "The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the Judiciary Act of 1879, 1 Stat. at L., 73, declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment."

That a sentence of fine and imprisonment where the statutory authority to impose punishment provides only for fine or imprisonment is illegal although not entirely void, is shown by the decision of this Court in *Ex parte Lange*, 18 Wall. 163 at 174, 21 L. Ed. 872 at 878. This Court said:

> "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute when it had the alternative of only one of them, did not make the judgment wholly void."

That case involved a violation of a criminal statute against stealing mail bags of the Post Office Department. That the same principle applies to the statutory right of the court to punish for contempt is shown by: *Wilson* v. *United States*, 26 F. (2d) 215; *Moss* v. *United States*, 23 Appeal Cases, D. of C., 485; *Clark* v. *United States*, 61 F. (2d) 695, 709, C. C. A. 8.

V.

The "Order Amending Judgment" Was Void.

A. It was entered in the absence of Petitioner.

As averred in the petition (Paragraph 17k) the order of October 1st, 1942, purporting to amend the sentence imposed on September 28th, 1942, was not entered in open court but merely filed with the Clerk in the absence of petitioner and his counsel; without notice to petitioner or his counsel and while petitioner was effectually prevented from being present by the previous sentence of the court. It is our contention that although the sentence of September 28th, 1942, was illegal and erroneous, this order of October 1st is utterly void. It is a fundamental right

of defendant, under the due process of law provisions of our Constitution, to be present at all stages of the proceeding, including the imposition of sentence: *Hopt* v. *Utah*, 110 U. S. 574, 579, 4 S. Ct. 202. This Court is confronted here with no mere omission of the traditional formalities—usually attendant upon imposition of sentence—sufficient to justify reversal in capital cases: *Ball* v. *United States*, 140 U. S. 118, 129, 11 S. Ct. 761. Of course, it has been held that in misdemeanors it is not necessary for the court to ask the defendant if he has anything to say why sentence should not be pronounced against him: *Turner* v. *United States*, 66 F. 287; *United States* v. *Austin Bagley Corporation*, 31 F. (2d) 229. But this record shows that petitioner was prevented from asserting his fundamental right to be present and to be heard on a matter affecting his personal liberty. The silence of the record is one thing; the positive denial of the right in any case where the facts must be established by testimony, whether civil, criminal or *sui generis* is quite another. Had he been present with his counsel he could have argued against this Order in that:

(a) The fine imposed by the sentence of September 28th had been paid, thus exhausting the further power of the court.

(b) The Amended Order illegally increases the term of imprisonment.

In *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914, it is said:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial

determination of his rights, and is not entitled to respect in any other tribunal."

The substance of a sentence of imprisonment is that part of it which prescribes the kind and amount of the punishment and the defendant must be present when it is imposed: 24 C. J. S. 74; *Anderson* v. *Denver*, 265 F. 3 (C. C. A. Kansas). These elements of it the court cannot change in the absence of the defendant or where jurisdiction has ceased by the expiration of the term or by the sentence going into execution: *Fels* v. *Snook, Warden*, 30 F. (2d) 187; *Hogan* v. *Hill*, 9 Fed. Supp. 333; *Ex parte Waterman*, 33 F. 29; 24 C. J. S. 1591. Of course it is conceded that since the time and place of punishment or execution are not strictly speaking part of the sentence it is not necessary that accused should be present when a change is made in them: *Schwab* v. *Bergren*, 143 U. S. 442, 12 S. Ct. 525, 36 L. Ed. 218.

In *United States ex rel. Coleman* v. *Coxe*, 47 F. (2d) 988, 990 (5 Cir.), it is said that no final action can be taken in a criminal case against a defendant while he is being detained from the court by action of the Government. Irrespective of the question as to whether a contempt proceeding is a criminal case within the meaning of the Sixth Amendment guaranteeing jury trial which this Court said it was not: *Myers* v. *United States*, 264 U. S. 95, 104, 105, 44 S. Ct. 272, 273, 68 L. Ed. 577, it, nevertheless, partakes of the nature of a criminal case to the extent that defendant is presumed to be innocent, is entitled to be confronted by witnesses against him and to be convicted only if the evidence establishes his guilt beyond a reasonable doubt: *Gompers* v. *United States*, 233 U. S. 604, 34 S. Ct. 693, 59 L. Ed. 1115; *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451.

But even in non-criminal cases there must be notice and opportunity to be heard. Although this Court in *Black-*

mer v. *United States*, 284 U. S. 421, 52 S. Ct. 252, sustained the right of the Supreme Court of the District of Columbia, under a special statute, to proceed to judgment in the absence of a recalcitrant witness, it was there pointed out that all the constitutional guarantees as to notice and opportunity to defend had been given. It was there said (284 U. S. at 438, 52 S. Ct. at 255):

> "for the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard."

Had the first sentence been void the court could have set it aside, brought the defendant before it and pronounced a valid sentence even though the execution of the void sentence had commenced: *Tinkoff* v. *United States*, 86 F. (2d) 868, 880; *King* v. *United States*, 98 F. (2d) 291, 69 Appeals, District of Columbia, 10. But since the first sentence was merely erroneous the Court could not set it aside and pronounce a new sentence: *Ex parte Lange, supra; Spivey* v. *McGilvray*, 84 P. (2d) 256 (Cal.).

A sentence imposed by a federal court on a prisoner in his absence, although he was present when the original sentence was pronounced, is void: *Price* v. *Zerbst*, 268 F. (2d) 72 (Georgia).

It is said in *Fisher* v. *Hayes*, 6 F. 63, 68:

> "It is well settled that contempt of court is a specific criminal offense, and that the imposition of a fine for a contempt is a judgment in a criminal case. New Orleans *v.* Steamship Company, 20 Wall. 387, 392."

The case of *In re Terry*, 128 U. S. 289, 9 S. Ct. 77, does not contradict the rule stated above. Indeed, it recognizes it fully. In that case, however, a contempt was committed in the presence of the court which had full knowledge of the facts and thus was under no obligation

to inform itself by testimony or otherwise and when the defendant fled the court-room this Court held that jurisdiction to vindicate its dignity did not depart along with him. In that case he had no right to notice or opportunity to defend.

B. The jurisdiction of the Court over the case was exhausted upon payment of the fine.

On October 1st, 1942, at approximately 10:30 a. m., as stated in the petition (Paragraph 10), petitioner, through his counsel, paid the $500 fine to the Clerk of the Circuit Court of Appeals. This payment was entered upon the docket by the Clerk (R. 2). The Clerk was the proper person to receive the payment on behalf of the United States: *Ex parte Lange, supra; In re Fletcher,* 107 F. (2d) 666, 668. On the afternoon of the same day the Circuit Court entered its order amending sentence (R. 2, 70). By that Order the Court sought to delete the sentence that Bradley pay the $500 fine but resentenced him to six months imprisonment.

We now contend that by payment of the fine in satisfaction of one of the alternative modes of punishment prescribed by the statute the petitioner was not subject to the further order of the court in that the jurisdiction of the court over him had ceased.

As shown above, the court could not legally impose both punishments but it did have the jurisdiction to impose either one. It therefore follows that a satisfaction of either one which the court had jurisdiction to impose renders the other alternative excessive and in consequence void. We contend that had petitioner endured imprisonment for six months he would have been entitled to his discharge, in that he could not have been held for additional compliance with the fine which had been imposed. For the same reason,

having satisfied that part of the judgment imposing fine, he was and is entitled to be discharged because he cannot be compelled to serve the term of imprisonment.

The case of *Ex parte Lange, supra,* is conclusive on the present question. There it was held that a judgment of a court that had been executed so far as to be in full satisfaction of one of the alternative penalties of the law, put an end to the power of the court over the offense. There, as here, the court had imposed fine and imprisonment when it had authority only to fine or imprison; there, as here, defendant paid the fine; there the court vacated its original order and brought the defendant before it for re-sentence; here the court did not even do that but simply filed its "Order Amending Judgment"; there this Court held that the original judgment of sentence was erroneous but that the second one was void and the defendant was discharged upon habeas corpus.

See also: *Moss* v. *United States,* 23 Appeal Cases, District of Columbia, p. 485; *People ex rel. Maglori* v. *Siman,* 284 Ill. 28.

In *Re Swan,* 150 U. S. 637, 14 S. Ct. 225, it was erroneously ordered by a Circuit Court in a contempt case that defendant be sentenced to imprisonment until restoration of certain goods unlawfully seized and upon such restoration then to three months imprisonment and until payment of costs. On habeas corpus this Court held that petitioner was not entitled to discharge in that he had not suffered any of the alternative punishments provided by statute and that "he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose. Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18."

In *Hill, Warden* v. *United States ex rel. Wampler,* 298 U. S. 460, 464, 56 S. Ct. 760, 762, it is said that the sentence

is the judgment and that if the entry is inaccurate there is a remedy by motion to correct it to the end that it may speak the truth. That case, however, is no authority for the proposition that where a judgment of sentence is pronounced and execution of it has begun the terms of the judgment itself may be altered. The proposition for which that case stands, so far as it is relevant to the present argument, is merely that the court can correct an error in its own records to the end that those records may speak the truth as to the judgment pronounced. Here there is—and can be—no contention that the record of the court as of September 28th improperly states the judgment of the court. The record showing the imposition of fine and imprisonment was correct because that is exactly the judgment that was pronounced orally (R. 40) and signed by the Court and intended to be entered into the records (R. 69).

The case of *United States* v. *Benz*, 282 U. S. 304, 51 S. Ct. 113, is no authority for the a on of the court in the present case. There it is true the defendant had commenced upon service of the sentence imposed and the court diminished that sentence by subsequent order made within the term. Two distinctions, however, at once appear. First: Such subsequent order was granted on the petition of the defendant himself; Second: the defendant had not fully satisfied one of the alternative punishments which the court had the power to impose.

The following statement in *Ex parte Lange* is particularly apt, (18 Wall. at 176, 85 U. S. at 879):

> "The record of the court's proceedings, at the moment the second sentence was rendered, showed in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days imprisonment on account of

the other. It thus showed the court that its power to punish for that offense was at an end."

The only possible distinction between the Lange case and the present that may be raised by the prosecution is that there the fine, which was paid to the Clerk, was by him paid into the Treasury and hence it was beyond the power of the Court to recall it, whereas here the record does not show such to be the case. But the very Court in which this proceeding arose, i. e. the Circuit Court of Appeals for the Third Circuit, has held this difference to be of no consequence. In *Yavorsky* v. *United States*, 1 F. (2d) 169, that Court reversed the District Court on an appeal in a habeas corpus proceeding where the District Court had not discharged relator where the facts were identical with those in the present case. That Court said (p. 171):

> "After the fine was paid, whether the money representing it was held, during the five days defendant was in jail, by the marshal only, or by the marshal part of the time and by the clerk part of the time, or by the marshal, clerk, and the treasury of the United States, each, part of the time, was of no concern to the defendant, and had no bearing upon the suffering by him of that alternative penalty. When he had fully complied with that part of the sentence, he had as fully suffered that alternative punishment as if the fine had forthwith been deposited into the treasury of the United States by the marshal. The court was without power to remit the fine after the punishment imposed had been suffered, and the writ of habeas corpus should have been allowed, and the prisoner discharged."

Here, however, relief has not been sought yet on habeas corpus because the judgment is that of the Circuit Court of Appeals which has no power to issue writs of habeas corpus: *Ex parte Craig*, 282 Fed. 138 (2 Cir.); certainly not to issue original and independent writs of habeas corpus:

Whitney v. Dick, 202 U. S. 132, 137, 26 S. Ct. 584, 50 L. Ed. 963. The term at which both the original sentence and the re-sentence were imposed expired on October 5th, 1942.

It is at least doubtful whether the District Court could discharge on habeas corpus where relator is committed by the Circuit Court of Appeals. Apart from these considerations, petitioner feels entitled to the broader review available on certiorari.

C. The "Order Amending Judgment" illegally attempted to increase a sentence which was fully satisfied or at least partly satisfied.

The sentence imposed on September 28th, 1942, was that the defendant "be imprisoned for the period of six months and pay a fine of $500 and stand committed until the sentence is complied with. It is further ordered that the United States Marshal for the Eastern District of Pennsylvania shall forthwith execute this judgment" (R. 40, 69).

As the petition recites (Paragraph 10) the said Marshal took petitioner into custody and incarcerated him in the Philadelphia County Prison where he remained at all times until October 7th, 1942, when he was removed to the County Prison of Berks County in the City of Reading, Pennsylvania, and he has remained in that prison up to the time of the filing of the petition.

It is seen, therefore, that petitioner entered upon the execution of that sentence on September 28th, 1942. On October 1st, 1942. the court entered a new Order (R. 70) purporting to amend its original Order. A certified copy of that re-sentence upon which petitioner is now held was transmitted to the United States Marshal on October 1st, 1942 (R. 2). Thus it is seen that the re-sentence dates from October 1st, 1942, and that the six months imprisonment is to be computed from said date because the court said,

"It is by the court *now* ordered and adjudged that the said William V. Bradley be imprisoned for the period of six months" (R. 71). This Order, although purporting to amend a former one, was under its own terms purely prospective and in no sense retrospective. Indeed, it could not have been retrospective or *nunc pro tunc*. In *Ex parte Buskirk*, 72 Fed. 14, 20 (4 Cir.), the Court says:

> "The rule is now well established that nunc pro tunc orders cannot operate to modify orders theretofore made or to take the place of orders intended to be made but omitted. The courts can by such orders supply omissions in the record of what was actually done in the cause at a former time when it was under consideration, and by mistake or neglect not entered in the clerk's minutes or the court's records; but where the court has omitted to make an order which it could have made, and in fact intended to make, it cannot subsequently make the same nunc pro tunc, so as to make it binding upon the parties to the suit from the date when it was so intended to have been entered; and especially is this so in matters relating to criminal proceedings and those involving rules for contempt. Hyde *v.* Curling, 10 Mo. 359; State *v.* Clark, 18 Mo. 432; 1 Bish. Cr. Proc. Sec. 1160; Bank *v.* Dudley, 2 Pet. 522; In re Wight, 134 U. S. 136, 10 Sup. Ct. 487; Bullitt Co. *v.* Washer, 130 U. S. 142, 9 Sup. Ct. 499; Brignardello *v.* Gray, 1 Wall. 627; Nabers *v.* Meredith, 67 Ala. 333; In re Limerick, 18 Me. 183; Smith *v.* Hood, 25 Pa. St. 218."

It is obvious, therefore, that the Order of October 1st imposes upon petitioner an additional term of imprisonment of three days. This is beyond the power of the Court even though done within the term in which the original judgment was entered; it constitutes a violation of the double jeopardy provision of the Fifth Amendment: *Ex parte Lange, supra.*

In *United States* v. *Benz*, 282 U. S. 304, 306, 51 S. Ct. 113, 114, the Court held:

(a) Judgments, decrees and orders are within the control of the court during the term at which they were made;

(b) This rule does not authorize increasing a sentence which has been partly executed.

The sentence of September 28th was not void but merely erroneous: *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *People* v. *Connelly*, 27 Cal. A. 372, 150 P. 412; *State* v. *Addy*, 43 N. J. L. 113, 39 Am. R. 547.

The general rule is stated to be that where defendant has begun or has completed a valid sentence it is ordinarily beyond the power of the trial court to set it aside and render a new sentence. This is so even during the term at which the sentence was rendered: *Simmons* v. *United States*, 89 F. (2d) 591 (C. C. A. Texas); *Cisson* v. *United States*, 37 F. (2d) 330 (C. C. A. S. Car.); *Hynes* v. *United States*, 35 F. (2d) 734, 735 (C. C. A. Ill.); *Yavorsky* v. *United States*, 1 F. (2d) 169 (C. C. A. Penna.). See cases cited: *Buhler* v. *Hill*, 7 F. Supp. 857 (D. C. Penna.); *Kidwell* v. *Zerbst*, 19 F. Supp. 475 (D. C. Ga.). See generally: 24 C. J. S. 1589a.

Respectfully submitted,

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